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No. 83-490

In the Supreme Court of the United States

OCTOBER TERM, 1983

RALPH DAVIS, ET AL., APPELLANTS

v.

GREGORY SCOTT SCHERER

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

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QUESTION PRESENTED

The United States will address the following question:

Whether the violation of an administrative regulation abrogates a government official's qualified immunity from a constitutional damages suit, even though such conduct did not violate any clearly established constitutional right of the plaintiff.

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INTEREST OF THE UNITED STATES

This case presents an important question regarding the scope of the qualified immunity generally accorded public officials in litigation brought under 42 U.S.C. 1983 and *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). The district court, in a decision that was summarily affirmed by the court of appeals (J.S. App. 85a-86a), concluded that, even though appellant state officials did not violate any clearly established due process right of appellee in terminating his employment, they must nevertheless respond in damages because of their failure to comply with state regulatory guidelines applicable to the discharge (J.S. App. 70a). Because the decision below imposes monetary liability upon appellants without a showing that they violated appellee's clearly established constitutional rights, it represents a substantial restriction of the qualified immunity that this Court has previ-

ously conferred upon public officials in constitutional damages actions.

Although this case involves the immunity of state officials under 42 U.S.C. 1983, the immunity principles developed by the Court here will be generally applicable to *Bivens* actions brought against federal officials directly under the Constitution. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 n.30 (1982). Therefore, the question whether regulatory violations divest state officials of qualified immunity in a constitutional damages action brought under 42 U.S.C. 1983 is of substantial concern to the United States.

STATEMENT

Appellee Gregory Scott Scherer is a former member of the Florida Highway Patrol (J.S. App. 3a). In October 1977 the Highway Patrol discharged him, without affording him formal pre-termination notice or opportunity to complain, for failure to obey orders to give up a second job (*id.* at 7a-10a). Appellee pursued a grievance through the Florida civil service system but, on the eve of his civil service hearing in August 1978, he reached an agreement with the Highway Patrol providing reinstatement with partial back pay (*id.* at 10a-14a). Some months later, he resigned from the Highway Patrol to take another job (*id.* at 22a-23a).

Appellee then instituted this suit for damages under 42 U.S.C. 1983 against appellants Ralph Davis and J.E. Beach, the two Highway Patrol supervisors who had approved his 1977 dismissal (J.S. App. 4a).[1] Appellee

[1] The suit also named Chester Blakemore as a defendant in his official capacity as Director of the State Department of Highway Safety and Motor Vehicles (J.S. App. 1a). In addition to damages under 42 U.S.C. 1983, appellee sought a declaratory judgment pursuant to 28 U.S.C. 1651, 2201 and 2202 that the Florida statute under which his civil service claim had been processed was violative of due process (J.S. App. 2a). In its initial decision, rendered in July 1981, the district court declared Fla. Stat. § 110.061 (1977) unconstitutional on various due process grounds (J.S. App. 50a). When the State informed the district court that the statute had

claimed that his 1977 termination did not comport with the procedural due process requirements of the Fourteenth Amendment (*id.* at 1a-2a). On July 15, 1981, the district court entered a memorandum opinion in which it concluded that appellee's due process rights had been infringed (*id.* at 30a-39a)[2] and that appellants were not entitled to qualified immunity because appellee's constitutional right to "pretermination procedures was clearly established" at the time of his discharge (*id.* at 45a). The court therefore awarded appellee $4,200 "in compensatory damages for his mental and physical pain and suffering" (*id.* at 51a).[3]

Five days after the entry of the district court's July 15 order, the Fifth Circuit decided *Weisbrod* v. *Donigan*, 651 F.2d 334, 336 (1981), which held that Florida officials "did not act in disregard of any well-settled constitutional rights" in discharging a permanent state employee in 1978 without a pre-termination conference. On motion for reconsideration, the district court concluded that *Weisbrod* required it to vacate its prior determination that appellants had terminated appellee in 1977 in violation of his clearly established due process rights (J.S. App. 66a-67a). The court nevertheless concluded that appellants were not entitled to qualified immunity because their actions contravened the provisions of a newly

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been repealed by the Florida legislature, the court entered an amended judgment declaring the newly enacted civil service statute unconstitutional (J.S. App. 80a). The United States will not address the propriety of the district court's entry of declaratory relief in the circumstances of this case.

[2] The district court found that appellants had failed to grant appellee "an effective opportunity to rebut the claim of conflict [between his two jobs] * * * prior to the termination decision" (J.S. App. 35a).

[3] The district court also initially awarded appellee $5,000 in exemplary damages because of appellants' purported failure to follow departmental disciplinary guidelines in firing him (J.A. App. 51a). On reconsideration, the court vacated this award as "not supported by the evidence" (*id.* at 72a).

adopted Highway Patrol personnel regulation that required a "complete investigation" into charged instances of misconduct prior to the termination of a departmental employee (*id.* at 69a).[4] On the basis of this administrative defect, the court held that appellants "are not entitled to qualified immunity because their belief in the legality of the challenged conduct was unreasonable" (*id.* at 70a). The court explicitly recognized that appellee "is not entitled to recover damages based on the theory" that appellants violated his "clearly established due process" rights, but it concluded that "he may recover compensatory damages for [appellants'] failure to comply with the department's procedures in regard to his dismissal" (*id.* at 71a). The court therefore reaffirmed its $4,200 award of compensatory damages, emphasizing that, if the departmental order violated by appellants "had not been adopted just prior to [appellee's] dismissal, no damages of any kind could be awarded" (*id.* at 70a).

The court of appeals affirmed "on the basis of the Memorandum and Opinion of the district judge" (J.S. App. 83a-84a).[5]

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[4] The regulation provides, in pertinent part (J.S. App. 69a):

> Upon receiving a report of * * * a violation of Department or Division rules and regulations * * *, the Director shall order a complete investigation to determine the true facts concerning the circumstances surrounding the alleged offense. The completed investigation report will also contain a written statement made by the employee against whom the complaint was made. If after a thorough study of all information concerning the violation, the Director decides that a * * * dismissal will be in order, he will present the employee in writing with the reason or reasons for such actions.

[5] Appellants have invoked the Court's appellate jurisdiction under 28 U.S.C. 1254(2), which permits appeal of any decision of a court of appeals holding a state statute unconstitutional, but which restricts review "to the Federal questions presented." Relying upon a narrow interpretation of Section 1254(2), appellee has argued that the immunity question addressed by the United States in this brief is not properly before the Court (Mot. to Dis. or Aff. 26-28). See also 12 *Moore's Federal Practice* ¶ 435.01[2], at 6-55 (2d ed. 1982).

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court's decisions regarding the scope of official immunity from damages actions brought under 42 U.S.C. 1983 and *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), reflect "an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, * * * but also 'the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority'" (*Harlow* v. *Fitzgerald*, 457 U.S. 800, 807 (1982), quoting *Butz* v. *Economou*, 438 U.S. 478, 504-505, 506 (1978)). The tension between these "competing values" has been resolved by according most public officers "qualified immunity" from constitutional damages actions arising out

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The United States submits that the Court has the authority to reach and should address the second "federal question" presented by appellants.

Although the Court has noted that "statutes authorizing appeals are to be strictly construed" (*Silkwood* v. *Kerr-McGee Corp.*, No. 81-2159 (Jan. 11, 1984), slip op. 7), the parameters of an appeal under 28 U.S.C. 1254(2) are not as narrow as appellee suggests. See 17 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4037, at 40-41 (1978); Stern & Gressman, *Supreme Court Practice* 68 (5th ed. 1978). In construing the parallel provision authorizing appeals from state courts, 28 U.S.C. 1257, the Court has given its appellate jurisdiction a considerably broader scope. See *Flournoy* v. *Wiener*, 321 U.S. 253, 263 (1944) ("Appellant having assigned as error the decision of the Louisiana Supreme Court holding the federal Act invalid, the case is properly an appeal, and appellant could have included in his assignments of error any other denial of federal right whether or not capable in itself of being brought here by appeal"). And, in *Leroy* v. *Great Western United Corp.*, 443 U.S. 173 (1979), the Court adressed a venue issue raised by the appellants without intimating that such a course of action raised jurisdictional difficulties under 28 U.S.C. 1254(2). Like the venue issue in *Leroy*, the qualified immunity issue presented by appellants is a "federal question" of significant import. It is, therefore, within the appellate jurisdiction of the Court.

of the performance of their official duties.[6] Although the exact parameters of this "qualified immunity" remained unclear for a time (see, *e.g.*, *Scheuer* v. *Rhodes*, 416 U.S. 232, 249 (1974)), it is now settled that public officials are immune from claims for monetary damages unless they violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. at 818. See also *Procunier* v. *Navarette*, 434 U.S. 555, 565 (1978); *Wood* v. *Strickland*, 420 U.S. 308, 322 (1975).

In this case, appellee entered federal court with a claim that appellants had violated his Fourteenth Amendment right to procedural due process by terminating his employment without notice and a hearing. Although the district court ultimately concluded that appellee's constitutional right to such procedures was not clearly established at the time of his dismissal, it nevertheless held that appellants were not entitled to qualified immunity because appellee's termination did not comply with the dictates of an applicable Highway Patrol personnel regulation (J.S. App. 71a). Because, in its view, appellants' failure to follow a state departmental regulation was "unreasonable" (*id.* at 70a), the court awarded appellee damages for the "mental and physical pain and suffering" (*id.* at 81a) caused by appellants' conduct.

The decision of the courts below has some surface appeal. By making a public official's eligibility for qualified immunity depend upon whether his conduct was "reasonable" in all the circumstances, the decision undoubtedly furthers the public interest in compensating aggrieved

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[6] To date, absolute immunity has been accorded only to the President (*Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982)), members of the judiciary (*Stump* v. *Sparkman*, 435 U.S. 349 (1978)), congressmen and their aides performing legislative functions (*Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491 (1975); *Gravel* v. *United States*, 408 U.S. 606 (1972)), and prosecutors and administrative officers engaged in adjudicative or prosecutorial functions (*Imbler* v. *Pachtman*, 424 U.S. 409 (1976); *Butz* v. *Economou*, 438 U.S. at 508-517).

citizens and deterring official misconduct. The lower courts, however, did not consider whether such an expansion of liability for constitutional torts would " 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials] in the unflinching discharge of their duties.' " *Harlow* v. *Fitzgerald*, 457 U.S. at 814 (quoting *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950)). The decision below fails to recognize that the "resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative." *Harlow* v. *Fitzgerald*, 457 U.S. at 813-814. By making the availability of qualified immunity turn on compliance with state administrative procedure, rather than on the observance of clearly established constitutional rights, the lower courts have dramatically and erroneously altered the liability/immunity balance so recently struck in *Harlow*.

The approach of the lower courts is misguided for several reasons. First, the prior decisions of this Court hold that under the now-prevailing objective qualified immunity test, an official is entitled to immunity in a constitutional damages action unless he disregards the "clearly established" constitutional rights of the plaintiff; here, appellants did not violate any clearly established due process right of appellee. Second, the lower courts' rationale threatens to undermine the Court's recent reformulation of the qualified immunity standard. In *Harlow*, the Court foreclosed any inquiry into the subjective "good faith" of a public official in order to "permit '[i]nsubstantial lawsuits [to] be quickly terminated' " (457 U.S. at 814 (quoting *Butz* v. *Economou*, 438 U.S. at 507-508)). Under the approach embraced below, and contrary to what *Harlow* sought to accomplish, the immunity of public officials will become less certain and predictable—and more difficult to establish in dispositive pre-trial motions—as courts delve into the nature, extent and possible justifications for statutory or regulatory lapses by defendant officials. Finally, the decision below will unjustifiably deter vigorous

decisionmaking by public officers and discourage legislatures and other regulatory bodies from enacting prophylatic measures to channel official conduct.

ARGUMENT

A PUBLIC OFFICIAL IS ENTITLED TO QUALIFIED IMMUNITY FROM A CONSTITUTIONAL DAMAGES SUIT UNLESS HE HAS VIOLATED A "CLEARLY ESTABLISHED" CONSTITUTIONAL RIGHT

A. The Objective Qualified Immunity Test Formulated By The Court In Constitutional Damages Actions Focuses On The Violation Of Constitutional, Not Statutory Or Regulatory, Rights

This Court's decisions evidence significant evolution in the concept of official qualified immunity. Beginning from generalized notions of good faith (*Pierson* v. *Ray*, 386 U.S. 547, 555-557 (1967)), the doctrine of qualified immunity developed subjective and objective components (*Wood* v. *Strickland*, 420 U.S. at 322), and most recently has been reformulated as an entirely objective test (*Harlow* v. *Fitzgerald*, 457 U.S. at 818). Although a public official's claim to qualified immunity in a constitutional damages action previously encompassed a wide-ranging consideration of the legal and factual circumstances surrounding the alleged official misconduct, invocation of qualified immunity now raises a single, strictly legal issue: whether the plaintiff has alleged the violation of a clearly established constitutional right of which a reasonable public official would have known.

Here, it is undisputed that appellants did not violate any clearly established constitutional norm in dismissing appellee from his job with the Florida Highway Patrol. Indeed, at the time appellants acted, they had no reason to know that their conduct transgressed constitutionally mandated concepts of due process. In these circumstances, the lower courts erred in rejecting appellants' defense of qualified immunity.

1. This Court's modern qualified immunity jurisprudence begins with *Pierson* v. *Ray*, *supra*. There, without

using the term "qualified immunity," the Court held that the traditional "good faith and probable cause" defense available to police officers in arrest cases at common law remained available in constitutional suits under 42 U.S.C. 1983 (386 U.S. at 555-557). The defense would apply where "the officers reasonably believed in good faith that the arrest was constitutional, * * * even though the arrest was in fact unconstitutional" (*id.* at 557). Although the Court suggested that police officers would not be immune from suit if they acted in subjective bad faith (*ibid.*), the Court stressed that this "good faith" immunity had an objective component. Police officers could be held liable only if they violated established constitutional rights: "a police officer is not charged with predicting the future course of constitutional law" (*ibid.*).

In the mid-1970s the Court issued a series of decisions applying the "good faith" defense, now called "qualified immunity," to a variety of constitutional damages claims against state officials under 42 U.S.C. 1983. *Scheuer* v. *Rhodes*, *supra*, was a Section 1983 suit against the Governor of Ohio and others arising out of a much-publicized shooting incident at Kent State University. Although the procedural posture of the case gave the Court "no occasion for a definitive exploration of the scope of [qualified] immunity" (416 U.S. at 249),[7] the Court nevertheless held that *Pierson*'s interlocking requirements of subjective good faith and objective reasonableness provided the appropriate immunity inquiry in constitutional damages cases. 416 U.S. at 244-248.[8]

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[7] The court of appeals had sustained the district court's dismissal of the complaints in *Scheuer* on the ground of "absolute 'executive immunity'" (416 U.S. at 238). After concluding that the respondents were entitled to qualified rather than absolute immunity, the Court declined to determine the precise scope of that reduced immunity from suit (416 U.S. at 249-250).

[8] The Court explained in *Scheuer* that "[i]t is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct" (416 U.S. at 247-248).

A year later, *Wood* v. *Strickland*, *supra*, squarely applied the *Pierson* test to a Section 1983 action based on an alleged denial of procedural due process. In *Wood* the Court expressly established a two-part qualified immunity test that turned upon subjective intent as well as the objective reasonableness of the public official's conduct. According to *Wood*, a school board member would be immune from students' constitutional suits unless he acted with "an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith" (420 U.S. at 322). *Procunier* v. *Navarette*, 434 U.S. at 561-562, applied the same test to a damages suit based on a constitutional controversy over state prisoners' mailing privileges. Both *Wood* and *Navarette*, however, emphasized the objective prong of this two-part test; the Court reiterated in each case that an official cannot be expected to predict "the future course of constitutional law." 420 U.S. at 322; 434 U.S. at 562.

In 1978, this Court held that, in general, federal officials sued directly under the Constitution would receive the same immunity as state officials sued under Section 1983. *Butz* v. *Economou*, *supra*. The Court kept the subjective and objective components of the qualified immunity doctrine intact (438 U.S. at 507), but expressed its expectation that qualified immunity, coupled with the "firm application of the Federal Rules of Civil Procedure," would permit the speedy resolution of "insubstantial lawsuits" (438 U.S. at 507-508). See also *Hanrahan* v. *Hampton*, 446 U.S. 754, 764-765 (1980) (Powell, J., concurring in part and dissenting in part).

The history leads to *Harlow* v. *Fitzgerald*. Despite the Court's expressed desire in *Butz* that governmental officials not be "harassed by frivolous lawsuits" (438 U.S. at 508), it had become apparent that the "impermissible motivation" or "bad faith" component of the qualified immunity test prevented summary disposition of many, if not most, meritless constitutional damages claims (*Har-*

low, 457 U.S. at 815-816). Because an "official's subjective good faith has been considered to be a question of fact" (457 U.S. at 816), and Fed. R. Civ. P. 56 does not permit summary disposition of disputed questions of fact, the invocation of official qualified immunity rarely prevented a trial; plaintiffs could almost always raise a factual issue regarding the defendant's "good faith." The Court noted in addition that "substantial costs attend the litigation of the subjective good faith of government officials" (457 U.S. at 816). These costs include "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service" (*ibid.*).

The Court, therefore, reassessed the "balanc[e] of competing values" that undergirded its prior qualified immunity cases and reformulated the concept of official qualified immunity (457 U.S. at 816). As a result, the subjective "good faith" component of qualified immunity was abandoned in favor of a purely objective test: officials performing discretionary functions would henceforth be shielded from liability in constitutional damages actions unless their conduct violated "clearly established" constitutional rights (457 U.S. at 818).

The Court's reformulation of the controlling legal test significantly increased the effectiveness of the protections afforded by official qualified immunity. This fact is evidenced by comparing that immunity after *Harlow* with this Court's description of qualified immunity in *Imbler* v. *Pachtman*, *supra*. There, the Court noted "important" procedural differences between qualified and absolute immunity: while "absolute immunity defeats a suit at the outset, * * * [t]he fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial" (424 U.S. at 419 n.13 (*citing Scheuer* v. *Rhodes*, 416 U.S. at 238-239; *Wood* v. *Strickland*, 420 U.S. at 320-322)). This comparison of absolute and qualified immunity, undoubtedly correct when rendered, is no longer apt—*Harlow* explicitly restructured the qualified im-

munity test to permit the defeat of a suit without the necessity of presenting evidence at trial.[9] The Court achieved this result, moreover, without departing from the historical roots of qualified immunity doctrine. The objective test demands respect for "basic, unquestioned constitutional rights" (*Wood* v. *Strickland*, 420 U.S. at 322) while ensuring that public officials will not be "charged with predicting the future course of constitutional law" (*Pierson* v. *Ray*, 386 U.S. at 557).

2. Application of the above principles to the facts of this case would seem to require reversal of the lower courts without further discussion. It is undisputed that appellants did not violate any clearly established due process right of appellee (see J.S. App. 66a-67a). Hence, appellants are immune from a suit resting on due process grounds.

In an effort to avoid this result, however, appellee has seized upon the statement in *Harlow* that a government official will lose his qualified immunity if he violates a "clearly established *statutory* or constitutional right[]"

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[9] See *Czurlanis* v. *Albanese*, 721 F.2d 98, 108 (3d Cir. 1983) ("We interpret [*Harlow*] as instructing the lower federal courts that the issue of qualified immunity would ordinarily be one of law for determination by the courts"); *Zweibon* v. *Mitchell*, 720 F.2d 162, 168 (D.C. Cir. 1983) (following *Harlow* the invocation of qualified immunity raises a "purely legal threshold question" because "once the trial judge determines that the law was not clearly established at the time the contested conduct occurred, the inquiry ceases"); *Windsor* v. *The Tennessean*, 719 F.2d 155, 165 (6th Cir. 1983), petition for cert. pending, No. 83-5611 ("The barriers to summary judgment presented by the discarded mixed objective-subjective test * * * no longer exist;" *Harlow's* "purely objective test" is to be applied "as a matter of law before discovery occurs") (citation omitted); *Stokes* v. *Delcambre*, 710 F.2d 1120, 1125 (5th Cir. 1983) (quoting *Trejo* v. *Perez*, 693 F.2d 482, 485 (5th Cir. 1982)) (*Harlow* establishes a two-level "progressive" inquiry: "'(1) Was the law clearly established at the time? If the answer to this threshold question is no, the official is immune. (2) If the answer is yes, the immunity defense ordinarily should fail unless the official claims extraordinary circumstances and can prove that he neither knew nor should have known that his acts invaded settled legal rights'").

(457 U.S. at 818) (emphasis added). Appellee contends (Mot. to Dis. or Aff. 21-26) that this statement supports the district court's conclusion that the violation of a statutory or regulatory provision precludes a public official from claiming qualified immunity from constitutional damages, even where the constitutional right violated by the official was not "clearly established" at the time he acted.[10] But, aside from its unexplained use of the term "statutory * * * rights" (457 U.S. at 818), *Harlow* contains no support for the decision below. On the contrary, a careful reading of *Harlow* indicates that the Court intended no change in the objective component of the qualified immunity test, which since the time of *Pierson* v. *Ray* has focused exclusively on whether an official had reason to believe that his conduct was unconstitutional.[11] Several factors dictate this conclusion.

First, the reference in *Harlow* to "clearly established statutory * * * rights" (457 U.S. at 818) seems no more than an acknowledgment that the plaintiff in *Harlow* was seeking damages on statutory as well as constitutional theories (457 U.S. at 820 n.36).[12] Given the statutory allegations in *Harlow*, and in the absence of any explanation from this Court, it is fair to conclude that

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[10] This case, of course, does not even involve a "statutory" right; appellants have been mulcted in damages for violating a Highway Patrol personnel regulation.

[11] See *Zweibon* v. *Mitchell*, 720 F.2d at 172 ("*content* of the [*Harlow*] standard is identical to that for establishing the 'objective' element of the old two-pronged test for qualified immunity") (emphasis in original).

[12] The respondent in *Harlow* sought damages for the violation of 5 U.S.C. 7211 and 18 U.S.C. 1505. Although the petitioners urged the Court "to rule on the legal sufficiency of respondent's 'implied' causes of action" under those statutes, the Court declined to address that question, noting that it had taken "jurisdiction of the case only to resolve the immunity question" (457 U.S. at 820 n.36). See also *Nixon* v. *Fitzgerald*, 457 U.S. at 748 n.27 (Court assumes, arguendo, in a companion case to *Harlow* "that private causes of action may be inferred * * * under * * * the two statutes on which respondent relies").

the "statutory" component of the *Harlow* test comes into play only where, as in *Harlow* itself and as may occur with some frequency in suits against state officials under 42 U.S.C. 1983 (see *Maine* v. *Thiboutot*, 448 U.S. 1 (1980)), plaintiffs seek damages from public officials for violation of statutory rights.[13] However, where a plaintiff seeks damages for violation of his *constitutional* rights, the immunity inquiry should focus on whether *those* rights were clearly established.[14]

Second, the Court in *Harlow* cited two cases in support of its reformulation of the qualified immunity test (457 U.S. at 818): *Procunier* v. *Navarette*, *supra*, and *Wood* v. *Strickland*, *supra*. Those cases, however, considered only whether officials had violated "clearly established constitutional rights," and did not suggest a further, statutory inquiry. Indeed, in *Navarette*, the prisoner plaintiffs claimed that the prison authorities had suppressed mail in "knowing disregard" of "applicable statewide prisoner mail regulations." 434 U.S. at 557. The Court, despite some expressed concern regarding this allegation (434 U.S. at 570-571) (Stevens, J., dissenting), granted the defendants qualified immunity as a matter of law, finding that "there was no established First Amendment right protecting the mailing privileges of state prisoners and that hence there was no such federal

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[13] Where a plaintiff seeks recovery for violation of a statutory right, whether or not the statutory right was "clearly established" at the time of the alleged violation would, of course, be central to the defendant official's claim of qualified immunity.

[14] See, *e.g.*, *Windsor* v. *The Tennessean*, 719 F.2d at 165 ("*If the law which the defendant is alleged to have violated* is clearly established, then the qualified immunity defense should fail") (emphasis added); *Harris* v. *Young*, 718 F.2d 620, 623 (4th Cir. 1983) (focus of *Harlow* is on "'clearly established constitutional rights"); *Barnett* v. *Housing Authority*, 707 F.2d 1571, 1582 (11th Cir. 1983) ("*Harlow* directs our attention to the *constitutional violation at issue*") (emphasis added); *Johnson ex rel. Johnson* v. *Brelje*, 701 F.2d 1201, 1210 (7th Cir. 1983) (when defendants have not violated clearly established constitutional right, violation of state law does not abrogate qualified immunity).

right about which [defendants] should have known." 434 U.S. at 562-563. The current case is no different from *Navarette*. It is difficult to understand why the present appellants' alleged violation of state regulations should divest them of qualified immunity in a constitutional suit, while the claimed regulatory violations in *Navarette* were of no consequence.

Finally, *Harlow*—like all the other qualified immunity cases decided by this Court—reiterated that a prime purpose of the objective test is to ensure that public officials not be required to anticipate as yet undeclared constitutional rights. 457 U.S. at 819 n.33. Yet that is precisely what would occur if, as held by the courts below, an official's compliance with relevant statutes and regulations became the inquiry in constitutional damages suits. Under that view of qualified immunity, an official could be held personally liable in damages even where the constitutional right he violated was not "clearly established" when he acted. It seems unlikely that *Harlow* silently created such an anomaly.[15]

B. Abrogation Of Qualified Immunity In Constitutional Damages Actions On The Basis Of A Statutory Or Regulatory Violation Is Inconsistent With The Rationale Of *Harlow* v. *Fitzgerald*

In *Harlow*, the Court steered a careful path between the competing interests at stake whenever a claim of official immunity is raised. The Court sought to provide a "realistic avenue for vindication of constitutional guarantees," without unduly diverting "official energy from

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[15] Indeed, Justice Brennan's concurring opinion in *Harlow* summarized the decision as "imposing liability when a public-official defendant 'knew or should have known' of the *constitutionally violative effect* of his actions" (457 U.S. at 820-821) (emphasis added). Justice Brennan presumably was discussing the commonplace constitutional damages suit, such as the present case, rather than the unusual statutory claims in *Harlow* that necessitated the "statutory" corollary to the qualified immunity standard. See also *id.* at 821 ("the clever and unusually well-informed violator of *constitutional rights* will not evade punishment") (emphasis added).

pressing public issues" (457 U.S. at 814). The objective qualified immunity test forged by the Court achieves these goals: it imposes liability where the alleged constitutional wrong is "clearly established" (457 U.S. at 818), while at the same time permitting "'[i]nsubstantial lawsuits [to] be quickly terminated'" on the basis of legal motions without the necessity of trial (457 U.S. at 814, quoting *Butz*, 438 U.S. at 507-508). The approach taken by the courts below, however, seriously disrupts this careful balance.

The district court's reasoning in denying appellants' qualified immunity claim is somewhat opaque.[16] The district court apparently assumed that defendants in constitutional damages actions are not entitled to official immunity if their conduct was in any way "unreasonable," and that a court should consider the "totality of the circumstances" in making that determination (J.S. App. 68a). Applying that analysis to this case, the court concluded that appellants were not entitled to immunity because, in light of the Highway Patrol regulation, "their belief in the legality of the challenged conduct was unreasonable" (*id.* at 70a). Thus, even though appellants were not aware that their dismissal of appellee violated constitutional standards, and even though the district court twice found that appellants had not acted maliciously or in bad faith (*id.* at 46a, 70a), the court stripped them of qualified immunity because of its determination that "unreasonable" officials should not be able to take advantage of what traditionally has been considered a "good faith" defense.

The district court's reasoning may have made some sense before this Court's decision in *Harlow*, but it obviously is no longer good law.[17] Prior to *Harlow*, a public official's compliance with applicable statutory or regulatory proscriptions was perhaps relevant to the question

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[16] The rationale for rejecting appellants' immunity defense is further clouded by the court of appeals' failure to write an opinion (J.S. App. 83a-84a).

[17] We note that the district court issued its decision on reconsideration approximately two weeks prior to the decision in *Harlow*.

of the official's subjective good faith. The violation of a statute or regulation may have provided some evidence that the official had "acted with such an impermissible motivation * * * that his action cannot reasonably be characterized as being in good faith" (*Wood* v. *Strickland*, 420 U.S. at 322).[18] *Harlow*, however, explicitly foreclosed any inquiry into the subjective motivation behind alleged official misconduct, so that "bare allegations of malice [would] not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery" (457 U.S. at 817-818).

It could be argued, of course, that a limited reintroduction of the subjective element of the qualified immunity defense, to the extent of inquiring into whether the defendant has acted in "bad faith" by violating a statutory or regulatory provision, would raise none of the concerns about protracted evidentiary proceedings that prompted the Court's decision in *Harlow*. But, despite its surface appeal, that argument is incorrect. Although it may appear otherwise at first blush, the mere violation of a statute or regulation provides little objective indication that a public official has acted with an "impermissible motivation" toward a particular plain-

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[18] Indeed, at least one court suggested, in a case decided shortly before *Harlow*, that statutory or regulatory violations were *dispositive* of the subjective good faith issue. See, *e.g.*, *Williams* v. *Treen*, 671 F.2d 892, 899 (5th Cir. 1982), cert. denied, No. 82-281 (Jan. 10, 1983) (violation of state law abrogates qualified immunity because "[i]f an official's conduct contravenes his own state's explicitly and clearly established regulations, a subjective belief in the lawfulness of his action is *per se* unreasonable"). The First Circuit, in a case decided after but without citation to or discussion of *Harlow*, similarly concluded that the violation of a state regulation is sufficient to rebut a "defendant's 'good faith' defense." *King* v. *Higgins*, 702 F.2d 18, 21 (1983). This Court's rejection of the subjective good faith prong of the qualified immunity test undercuts the rationale of both *Williams* and *King*. See *Saldana* v. *Garza*, 684 F.2d 1159, 1163 n.15 (5th Cir. 1982) (*Harlow* "dispensed with the 'subjective' test of official good faith" upon which *Williams* was decided). See also *Johnson ex rel. Johnson* v. *Brelje*, 701 F.2d at 1210 (violation of state law does not abrogate qualified immunity in constitutional damages action).

tiff. Rather, consideration of statutory or regulatory violations in the immunity context would necessarily require extensive analysis of the state of mind of the offending public official, the nature of the legal proscription transgressed, the blame to be attached to such a shortcoming, and all possible justifications for the official action. In short, the approach of the district court would rapidly recreate the difficulties that the Court's reformulation of qualified immunity in *Harlow* was designed to avoid.

1. As a matter of logic, the failure to abide by a statute or regulation cannot demonstrate an "impermissible motivation" unless the offending public official *knows* he is acting in violation of a particular legal proscription. If a state social service worker were to deny a plaintiff welfare benefits in intentional disregard of well-established state procedural regulations, a court might understandably question the good faith of the defendant in a constitutional damages action brought under 42 U.S.C. 1983 and the Fourteenth Amendment's Due Process Clause. However, where the procedural lapse is unknowing or inadvertent, the moral culpability of the public official is considerably less. Actions taken in ignorance of statutory or regulatory provisions, while possibly negligent, can hardly be ascribed to a malicious intent to harm a particular person or be considered the equivalent of the "impermissible motivation" held in *Wood* v. *Strickland*, *supra*, to abrogate the pre-*Harlow* qualified immunity defense. Thus, actions taken without actual knowledge of a legal proscription do not provide substantial objective evidence of bad faith. It would not be appropriate, in such circumstances, to strip a public official of qualified immunity from a constitutional damages claim. Courts, therefore, would necessarily have to determine the state of mind of the defendant official before dissolving his official immunity on the ground of a statutory or regulatory lapse, and the violation itself would not be dispositive on that issue.[19]

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[19] It is not clear, in this case, whether appellants acted in violation of a known, well-established procedural regulation. The district

Not only does a statutory or regulatory violation lack, by itself, any necessary indication of the bad faith of the defendant public official, such a violation may also be irrelevant to the wrong for which the plaintiff seeks redress. It would make little sense to conclude that the violation of *any* statute or regulation demonstrates that the erring public official acted with an "impermissible motivation" toward the plaintiff, regardless of the nature of the provision involved. If a particular statute or regulation is not "intended primarily to confer important procedural [or substantive] benefits" upon the plaintiff (*American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532, 538 (1970)), its violation should have no impact on the defendant's claim of immunity. A policeman who does not comply with a departmental regulation regarding the use of sirens in residential areas while rushing to a robbery should not be deprived of official immunity in a constitutional damages action arising from his arrest of the robber. Nor should an Internal Revenue Service employee have to fear that the failure to prepare an audit "classification checksheet," as required by office procedures, will subject him to personal liability should a court conclude that the audit itself transgressed some newly declared principle of constitutional law. See II Audit, (CCH) Internal Revenue Manual § 4138.6 (1983).

Furthermore, not every statute or regulation is of equal dignity, and not every statutory or regulatory violation is subject to equal opprobrium. The violation of a personnel regulation designed to provide an employee with seven days' notice prior to a termination hearing clearly has

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court noted that the personnel regulation purportedly transgressed by appellants was adopted "just prior to [appellee's] dismissal" (J.S. App. 70a). Moreover, the district court did not make any finding that appellants were aware of this regulation; the court simply asserted that appellants "should be bound by their Department's own orders" (*id.* at 70a-71a). In fact, as noted above, the court stated on two occasions that it found "no evidence of malicious intention on the part of" appellants (*id.* at 46a; see also *id.* at 70a). Any violation of state regulations in this case, therefore, could well have been unintentional.

more relevance to a constitutional damages action seeking reparation for a due process violation than does the failure to prepare the notice itself in triplicate, as may be required by another administrative provision. By the same token, failure to meet the seven-day notification deadline by 24 hours is surely less probative of "impermissible motivation" than is failure to comply with the notification procedures at all. And even a complete failure to follow the notification procedures might be excusable because of, inter alia, erroneous reliance on an exception to the procedures for "good cause," or the advice of departmental counsel that the procedures are inapplicable, or the direction of a superior officer that the procedures should be disregarded, or an honest, albeit mistaken, belief that strict adherence to the procedures would be inappropriate in a given situation.[20]

Thus, the mere fact that a public official has violated a legally imposed duty is insufficient "objective" evidence, standing alone, to justify the imposition of damages liability; a court faced with such a violation would necessarily have to consider—and likely hear evidence on—whether a particular regulation or statute is "important," or whether a particular violation is insubstantial or otherwise justifiable. Violation of a statute or regulation, in short, is not an infallible "litmus test" for bad faith or unreasonable conduct.[21]

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[20] The evidence in this case showed that appellants "consulted both the [Highway Patrol's] personnel director and the [Patrol's] legal counsel before making the final dismissal decision" (J.S. App. 55a).

[21] Indeed, in this very case the district court found that, despite the regulatory violation, appellants "acted with no malicious intent in their dealings with [appellee]" (J.S. App. 70a). Appellee suggests however, that even though the regulatory violation does not indicate any malicious intent on the part of appellants to harm him, it nevertheless abrogates appellants' official immunity because it demonstrates that they "have exceeded their sphere of discretion" (Mot. to Diss. or Aff. 24). But this Court has never accepted the contention that official immunity disappears any time a plaintiff

2. The above considerations demonstrate that, far from providing "objective" evidence of "impermissible motivation," injection of statutory or regulatory violations into constitutional damages actions would merely open the door to a host of fact-bound disputes, thereby frustrating *Harlow*'s intent to facilitate dispositive pretrial qualified immunity motions (457 U.S. at 815-818). If this Court were to conclude that a statutory or regulatory violation is relevant to a public official's qualified immunity, trial courts would be forced to inquire whether the violation was knowing, whether the transgressed provision confers any rights on the plaintiff, and whether the alleged error was—on the particular facts of the case—insubstantial or otherwise justifiable.[22] There would be "no clear end to the relevant evidence" (*id.* at 817). And if the *Harlow* "objective" test for qualified immunity in constitutional cases routinely were to

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claims that the defendant has exceeded his authority. Rather, the Court has concluded that an official is entitled to raise an immunity claim so long as the "alleged wrongful acts lay * * * within the outer perimeter of his authority" (*Nixon* v. *Fitzgerald*, 457 U.S. at 757). See also *Barr* v. *Matteo*, 360 U.S. 564, 575 (1959) (fact "that the action here taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable").

It is undisputed that appellants acted well within their respective spheres of authority in dismissing appellee; accordingly, the mere fact that appellee questions appellants' compliance with a personnel regulation does not, by itself, destroy their entitlement to qualified immunity. Any other rule would subject public officials "to trial on virtually every allegation that an action was unlawful, or was taken for a forbidden purpose" (*Nixon* v. *Fitzgerald*, 457 U.S. at 756).

[22] The district court did not pause to consider these factors. Although appellants arguably did not comply formally with the provisions of the personnel regulation cited by the court, the district court's own opinion shows that appellants conducted a thorough investigation into the circumstances surrounding appellee's dismissal, gave appellee numerous warnings as well as the opportunity to respond to those warnings in writing, and provided him with written reasons for his termination (see J.S. App. 6a-9a). The allegedly transgressed personnel regulation required little, if any, more (see *id.* at 69a). See also notes 19 & 20, *supra*.

require an inquiry into statutory and regulatory violations, there would appear to be no reason not to consider violations of other legal or ethical obligations as well, such as common law or contract obligations, or the various professional codes that govern the conduct of certain public officials. See, *e.g.*, Model Rules of Professional Conduct (1983); 1 *Criminal Justice Standards* chs. 3 & 4 (1980) (Standards Relating to the Prosecution Function and the Defense Function). Indeed, if the idea is to match perfectly the qualified immunity defense with public officials whose actions are "legal" or "reasonable" in every respect, the Court might as well resurrect the subjective "good faith" standard it discarded in *Harlow*.

In *Harlow*, however, this Court determined that, except perhaps where there is a right to statutory damages, only egregious constitutional violations preclude a public official from claiming qualified immunity. That standard on rare occasion may exculpate public officials who act maliciously, but it is necessary to prevent harassment of officials by insubstantial damages claims. As Judge Learned Hand suggested many years ago, official immunity is a price society willingly pays to avoid including diligent public servants among those exposed to trial and liability. *Gregoire* v. *Biddle*, 177 F.2d at 581.

In sum, the consequences of narrowing qualified immunity to those who can satisfy a judge or jury that their conduct was legally valid in every particular would be severe. Public officials would no longer enjoy a predictable or certain immunity standard, and *Harlow*'s expectation of expeditious handling of constitutional tort claims would be defeated in many situations.[23] This Court

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[23] The Court abandoned the "good faith" element of the qualified immunity defense in *Harlow* in part because "[i]t is not difficult for ingenious plaintiff's counsel to create a material issue of fact * * * where subtle questions of * * * a decisionmaker's mental processes are involved." 457 U.S. at 817 n.29 (quoting from *Halperin* v. *Kissinger*, 606 F.2d 1192, 1214 (D.C. Cir. 1979) (Gesell, J., concurring), aff'd by an equally divided Court, 452 U.S. 713 (1981)). The reformulation of the immunity defense adopted by the courts

should adhere to its established standard that, in constitutional suits, public officials are immune unless they violate "clearly established constitutional rights." That standard both serves the needs of effective government and ensures compensation to victims of blatantly unconstitutional conduct.

C. Abrogation Of Qualified Immunity In Constitutional Damages Actions Because Of A Regulatory Or Statutory Violation Would Unjustifiably Deter the Vigorous Performance Of Important Governmental Functions

As the courts and commentators have recognized, any immunity for public officials that is less than absolute is likely to have a serious, negative impact on decisionmaking. See *Nixon* v. *Fitzgerald*, 457 U.S. 731, 753 (1982); *Stump* v. *Sparkman*, 435 U.S. 349, 355-356 (1978); P. Schuck, *Suing Government* 59-81 (1983); Cass, *Damage Suits Against Public Officers*, 129 U. Pa. L. Rev. 1110 (1981).[24] The Court has nevertheless concluded that victims of deliberate constitutional misconduct should receive compensation, both out of fairness to the victims and out of a desire to deter egregious misuse of governmental power. See *Butz* v. *Economou*, 438 U.S. 504-508. The device of qualified immunity, in this Court's judgment, tolerably balances the needs of effective government and compensation of the victims of official wrong-

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below similarly would create an incentive for ingenious plaintiff's counsel to scour the statute books, regulations, and internal guidelines for the purpose of alleging that the defendant official's actions were unreasonable.

[24] An official inevitably finds "it difficult honestly and independently" to do his work if he knows "that unfavorable [action], coupled with an allegation of * * * malice, could subject him to * * * possible personal liability, as a result of which he might lose his home, his automobile, his savings and whatever other property, real or personal, he might possess." *Ove Gustavsson Contracting Co.* v. *Floete*, 299 F.2d 655, 658 (2d Cir. 1962), cert. denied, 374 U.S. 827 (1963). See also *Butz* v. *Economou*, 438 U.S. at 526-527 (Rehnquist, J., dissenting).

doing. That balance would tilt sharply against effective government, however, if public officials were held accountable in constitutional damages actions not only for indifference to "clearly established constitutional rights," but also for statutory and regulatory violations that are later determined to amount to a constitutional wrong. Such a rule would unduly chill competent and capable decisionmaking and would create a strong incentive for legislative and regulatory bodies not to enact prophylactic measures that go beyond current constitutional boundaries.

1. It is a fairly easy matter, as this Court well knows, to allege violations of open-ended constitutional provisions like the Due Process and Equal Protection Clauses. In recent times, for example, this Court has addressed whether matters as mundane as the negligent loss of prisoners' personal property (*Parratt* v. *Taylor*, 451 U.S. 527 (1981)), public employees' hair length (*Kelley* v. *Johnson*, 425 U.S. 238 (1976)), access by minors to coin-operated amusement devices (*City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283 (1982)), and local rock music concerts (*City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981)) implicate constitutional concerns. As the Court has remarked, a public official's risk of tort liability under Section 1983 "cover[s] a large range of activity in everyday life." *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. at 270.

Virtually any action taken by a public official, therefore, can result in a constitutional damages suit. A public official may overcome his apprehension of constitutional suits, however, and continue to serve the public in a vigorous and unintimidated manner, if he knows that he is at financial risk only if he defies a clearly established constitutional standard—a "basic, unquestioned constitutional right[]" (*Wood* v. *Strickland*, 420 U.S. at 322). But if the official's personal liability extends to all instances where a court, sifting through the myriad statutes or regulations that may apply to his conduct, declares

after the fact that a particular action transgressed not only a statute or regulation but also a newly declared constitutional right, the threat to effective government will increase markedly.

The approach taken by the district court is unduly disruptive of vigorous official decisionmaking because of the stiff penalty it exacts for a statutory or regulatory violation that, by itself, may not encompass a damages remedy. Regulatory bodies routinely impress a range of substantive and procedural proscriptions on government functionaries, thereby determining both the scope of discretion available to public officials and the consequences attending official misconduct. However, in imposing constitutional damages liability on appellants because of their purported regulatory lapse,[25] the district court did not consider whether, in promulgating its personnel regulation, the Florida Highway Patrol intended either to require that the mandated procedures occur in some formal sequence[26] or to impose stiff monetary fines upon erring officials. The Highway Patrol may well have intended that any transgression of the regulation be remedied through the state civil service appeals system and be deterred or punished by internal sanctions. But henceforth, the regulation involved in this case—as well as other, certainly more innocuous Highway Patrol regulations—will attain a sanctity clearly not foreseen by those who promulgated it. Appellants and other officers, with one eye on their pocketbooks and the other eye on

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[25] There is no question here that, absent appellants' alleged violation of the state Highway Patrol regulation, they would be immune from suit; the district court expressly stated that, without the state regulation, "no damages of any kind could be awarded" (J.S. App. 70a).

[26] The regulation clearly requires an investigation into allegations of employee misconduct, an opportunity for the investigated employee to respond in writing, and written reasons for any termination decision (J.S. App. 69a). As noted earlier (note 22, *supra*), the district court's opinion shows that appellants complied—at least informally—with these requirements (J.S. App. 6a-9a).

administrative guidelines, will walk wide of the mark set in any departmental regulation, whether or not the State of Florida or the Highway Patrol sought to enforce such exacting conduct.

The abrogation of qualified immunity in a constitutional damages action on the basis of statutory or regulatory violations thus would compel government decisionmakers to hew much closer to the "regulatory or statutory line"—and accordingly *would* deter much more conduct, including perfectly lawful conduct—than the enacting lawmakers may ever have intended. Such a result rests on less than firm legal ground,[27] and is certainly unwise as a matter of sound governmental policy.

Of course, even under appellee's reading of *Harlow*, post facto constitutional liability presumably would result only where a public official has violated a "clear" statute or regulation. But that condition offers little comfort, for public employees operate under a plethora of statutes,

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[27] The district court's approach, in effect if not in form, provides an "implied" damages remedy for the regulatory or statutory provisions involved in a constitutional damages suit. See J.S. App. 71a (even though appellee "is not entitled to recover damages based on the theory that [the due process violation was clearly established], he may recover compensatory damages for [appellants'] failure to comply with the [Highway Patrol's] procedures in regard to his dismissal"). If the decision below is affirmed, in every case where statutory or regulatory violations are pertinent to the qualified immunity issue (*i.e.*, those cases where there was no violation of a "clearly established constitutional right"), the sine qua non of a damages recovery will be a showing of a statutory or regulatory violation. And, although damages formally will be awarded for the "constitutional" injury, the mechanism in many instances will provide a ready "end run" around the Court's precedents controlling the creation of implied statutory damages actions. See, *e.g.*, *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 13-15, 19-21 (1981). *Cf. Davis* v. *Passman*, 442 U.S. 228, 241 (1979) (judiciary is "primary means" through which constitutional rights are enforced, but "[s]tatutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition who may enforce them and in what manner").

rules, and regulations that later may seem "clear" to judges or juries, but rarely are so clear in the heat of an emergency or as applied to unanticipated facts. Furthermore, although each employee ideally should know and understand the statutes and regulations bearing upon his performance, attaining such knowledge can be a formidable task. See generally any title of the Code of Federal Regulations; any issue of the Federal Register. At bottom, regardless of an employee's good faith efforts to comply with all pertinent job standards, what is required for fearless decisionmaking is confidence that unexpected liability will not occur. That confidence cannot be built in the face of the possibility that an unpredictable confluence of open-ended constitutional provisions and vague statutory or regulatory requirements will result in ruinous personal damages.[28]

2. The result below not only will interfere with effective official action by chilling government decisionmakers, it will also deter regulatory bodies who oversee official conduct from taking steps to proscribe and channel potential future misconduct. If the courts below are correct that statutory or regulatory requirements that anticipate later developments in constitutional law give rise to damages liability when violated, regardless of the intent of

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[28] A number of complex statutory and regulatory provisions, many of which demand the exercise of discretion in interpretation and enforcement, apply to the actions of public officials. If the decision below is not reversed, these provisions will become mine fields in which such officials will operate at their own risk. The Internal Revenue Code, and its implementing regulations, are but one example of a complex regulatory scheme where an inadvertent misstep by a government official could result in significant "constitutional" liability. See *Bothke* v. *Fluor Engineers & Constructors, Inc.*, 713 F.2d 1405 (9th Cir. 1983) (court of appeals expresses it view that a low-level IRS employee is not entitled to qualified immunity from a constitutional damages suit because she failed to construe a rambling protest letter, mailed by the plaintiff taxpayer long before the defendant IRS employee was assigned to collect the plaintiff's delinquent taxes, as a request for an "abatement" of assessed taxes).

the enacting body, legislatures and government agencies will have a powerful incentive not to enact protective provisions that go beyond the current minimum requirements of the Constitution. Rather than subject government officials to onerous personal liability for the violation of provisions foreshadowing constitutional developments, regulatory bodies may well opt to "have no rules except those mandated by [the Constitution], or to have them framed in a mere precatory form." *United States* v. *Caceres*, 440 U.S. 741, 756 (1979).

Such an incentive structure should be avoided. Statutes and regulations often provide greater rights than are secured by the Constitution. In this case, for example, the Highway Patrol regulation relied upon by the district court requires a "complete investigation" into allegations of employee misconduct (J.S. App. 69a). While such an investigation prior to the termination of an employee is undoubtedly consonant with sound notions of fair play, we are unaware of any decision declaring that such a procedure is required by the Fourteenth Amendment's Due Process Clause. As a result of the lower court's decision, however, Florida officials may delete any "complete investigation" requirement from their personnel regulations because the protection the provision affords government employees is simply outweighed by the potential personal liability the requirement creates for executive officials should a court conclude, sometime in the future, that a "complete investigation" is in fact required by the Due Process Clause. Indeed, the decision below has the perverse result of punishing appellants because they were unlucky enough to work for a concerned, attentive governmental body; appellants would be much better off if the Highway Patrol had entirely disregarded appellee's interests by not mandating any particular termination procedures.

This Court, therefore, should reject appellee's reformulation of the qualified immunity defense because of the inhibiting effect it would have on the development of regu-

lations and statutes governing the conduct of public officials. To paraphrase the Court's reasoning in *United States* v. *Caceres*, 440 U.S. at 755, "[r]egulations governing the conduct of [public officials] are generally considered desirable, and may well provide more valuable protection to the public at large than the deterrence [of official misconduct] flowing from the occasional [award of damages in a constitutional tort action]."

CONCLUSION

The judgment of the court of appeals on qualified immunity should be reversed.

Respectfully submitted.

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